Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1805

JOHN W. McTIGHE - - - - - Petitioner

versus

UNIVERSITY OF THE AMERICAS FOUNDATION, INC.
FERNANDO MACIAS RENDON
DR. HAROLD L. KIRKPATRICK and
EDWARD SIMMEN - - - - - Respondents

Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 21, 1979

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STATEMENT

This proceeding was initiated by a Complaint filed in the Jefferson County, Kentucky, Circuit Court by the Petitioner against the Respondents, a Delaware corporation and three individuals, nonresidents of Kentucky, asserting that the Respondents "transacted business in this Commonwealth and caused tortious injury to the plaintiff in this Commonwealth and caused injury to the plaintiff by breach of contract and warranty in this Commonwealth." By such allegations Petitioner sought to obtain jurisdiction over each of

the Respondents pursuant to the provisions of Section 454.210 of the Kentucky Revised Statutes providing for the service of process outside the Commonwealth in such instances as were alleged by the Petitioner. The Respondents denied the allegations which were intended to authorize service of process on them pursuant to the statute.

The Respondents timely presented motions to dismiss the Complaint, which motions, supported by appropriate allegations in the answers and by affidavits, were sustained by the Circuit Court.

Thereafter, the Court of Appeals of Kentucky sustained the judgment of the Circuit Court, and following that decision the Supreme Court of Kentucky denied discretionary review of the decision of the Court of Appeals. A petition for rehearing filed in the Court of Appeals was denied.

No Federal Question Was Presented Before the State Courts

The assertion is made by Petitioner (P., p. 2) that "The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3)." It may be assumed that the assertion is based upon language of that section which provides for review by the Supreme Court on petition for certiorari "where any title, right, privilege or immunity is specifically set up or claimed under the Constitution." There is a failure on the part of Petitioner to demonstrate the basis for the assertion, and therefore a failure to comply with the provisions of Rule 40(1)(b) of the Revised Rules of the Supreme Court

of the United States. Petitioner fails to specifically state wherein his right or privilege has been denied by the state courts.

The case was before three Kentucky courts, the Circuit Court, the Court of Appeals and the Supreme Court, and each court denied the claims set forth in the Petitioner's Complaint.

The Petitioner did not present to the state courts a contention or assertion that a federal question was involved. No one of said courts passed upon or could have passed upon a federal question. Thus there is a total failure on the part of Petitioner to comply with the provisions of Rule 23-1(b), and also Rule 23-1(f), of the Revised Rules of the Supreme Court of the United States. The latter Rule provides that the Petitioner in the statement of his case shall also,

> "specify the stage in the proceedings in the court of first instance and in the appellate court, to which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * * and the way in which they were passed upon by the court."

The provisions of the foregoing rules have not been complied with. The Court will not take jurisdiction of the case sought to be presented by Petitioner. The position is announced in many cases.

In the recent case of *Cardinale* v. *Louisiana,* 394 U. S. 437, 22 L. Ed. 2d 398 (1969), the Court held that it will not decide a federal constitutional issue raised before it for the first time on review of a state court

decision, and dismissed the writ of certiorari, granted to review a state court judgment, on the ground that the federal question presented "had never been raised, preserved or passed upon in the state court below," stating:

> "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions * * *."

In the early case, *Louisville, etc. R. Co.* v. *Woodford* (Ky., 1914), 34 S. Ct. 739, 234 U. S. 46, 58 L. Ed. 1202, the Court said:

> "The decisions of this court not only have repeatedly held that a federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice."

Additionally, the Petitioner is totally unable to present his case within the character of reasons which, pursuant to Rule 19-1 of the Revised Rules of the Supreme Court of the United States, would be considered by the Court on petition for writ of certiorari.

No question is presented for review by this court.

The Issues Decided by the State Courts Present No Federal Question

The opinion of the Court of Appeals of Kentucky rendered October 25, 1978, set forth at pages 12, *et seq.*, of the Petition for Writ of Certiorari, states exactly the questions considered by the state courts, *viz.:* whether the trial court erred in finding that it did not have personal jurisdiction over the nonresident appellees and whether the doctrine of *forum non conveniens* required the trial of issues elsewhere than before the Kentucky courts. Both qustions were decided in favor of the Respondents here.

Complaint is made (P., pp. 6, *et seq.*) that the Petitioner was not given an opportunity by the trial court to take depositions in order apparently to establish that a letter referred to was libelous in nature. The statement is (P., p. 5) that the Petitioner "was not given the opportunity to prove the language" of the letter was inaccurate and therefore removed a qualified privilege. The contention is defeated by (a) the failure of the Petitioner to have applied for an opportunity to take the deposition, and (b) the action by the court in its determination that the Respondents were not before the court.

The decision of this Court in *Herbert* v. *Lando,* et al., ____ U. S. ____, 60 L. Ed. 2d 115 (1979), sought to be relied upon by the Petitioner has no application to this case. There, the Court considered the rights of the parties under the provisions of the First Amendment to the Constitution and the hearings were based

upon procedural steps to properly raise the question of the right of the plaintiff to reach certain memoranda and conversations of and among the defendants. No question arose as to the jurisdiction of the Court over the parties in that case.

The Petition for Writ of Certiorari should be denied.

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Counsel for the Respondents

June 21, 1979

CERTIFICATE OF SERVICE

I, Squire R. Ogden, counsel for respondents, certify that the attached Brief for Respondents in Opposition to Petition for Writ of Certiorari and Letter of Appearance were served on petitioner by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on June 21, 1979, addressed to petitioner's counsel, Arthur R. Samuel, 1506 Citizens Plaza, Louisville, Kentucky 40202.

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